NO. 82-1219

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

HERBERT CLYDE SQUIRES
Petitioner

v.

IMMIGRATION & NATURALIZATION SERVICE
Respondent

REPLY TO RESPONDENT'S OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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TABLE OF AUTHORITIES

REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This case concerns an alien who has been ordered deported and forever barred from the United States on the basis of a twelve year old bad check conviction. On April 1, 1983, the government filed a brief in opposition to the petition for a writ of *certiorari*. In this reply brief, petitioner shows that the government opposition is flawed and that the petition for writ of *certiorari* should be granted.

ARGUMENT

1. The government does not deny that once the Court of Appeals disagreed with the reasoning of the administrative authorities, it should have remanded the case to the administrative authorities for determination of the novel "time of conviction" versus "time of entry" issue. The government, instead, argues that the Court of Appeals erred in going behind the petitioner's Canadian record of conviction for obtaining money under false pretenses to analyze the underlying facts — that petitioner wrote a check knowing that there were insufficient funds in his account.[1] The government thus disagrees with the *procedure* that the Court of Appeals used to determine the nature of petitioner's crime. The government does not dispute that if the record shows that petitioner Squires was

[1] This Court should be firmly aware that the government made this argument for the first time in opposition to *certiorari*. As the Court of Appeals noted, the government never disputed the fact that this was a bad check case. (Petition App. at 2, note 1) It is unreasonable for the government not to dispute an issue before the Court of Appeals and then argue to this Court that the Court of Appeals was wrong in proceeding on the basis of what it considered to be undisputed facts. This procedure is not fair to the petitioner or to the Court of Appeals.

indeed convicted of a bad check charge, then the Court of Appeals was correct to analogize his offense to the D.C. bad check statute.

a. The sole evidence introduced against the petitioner at the deportation hearing was a one-page record of conviction. This stated only that the petitioner was convicted of taking $450 by false pretenses from a Canadian bank. The Immigration and Naturalization Service introduced no other portions of the record explaining petitioner's crime. In Canada, as the Court of Appeals noted, all bad check cases are prosecuted under the false pretenses statute. (Pet. App. 9) Thus, the record is entirely consistent with petitioner's claim that his offense was writing a check knowing that there were insufficient funds in his account.

The government's argument is distressing because the bare state of the record is the government's doing. At the deportation hearing, the INS introduced only a sparse portion of the record of petitioner's conviction. No indictment, transcript of testimony or judicial opinion was introduced. Ordinarily, the Board of Immigration Appeals examines a *complete* conviction record, including the charge or indictment, the plea, the judgment or verdict, and the sentence in determining whether a crime is one involving moral turpitude or whether a crime is merely a petty offense. *Matter of Mena*, 17 I & N Dec. 38, 39 (BIA 1979) ("the record of (an alien's) conviction has generally been held to consist of the charge, the indictment, the plea, the verdict, and the sentence"). *See Matter of McNaughton*, 16 I & N Dec. 569 (BIA 1978) (examining opinions of Canadian trial and appellate judges to determine moral turpitude of alien's conviction); *Matter of Ghunaim*, 15 I & N Dec. 269, 270 (BIA 1975) (examining petitioner's indictment); *Matter of Katzanis*, 14 I & N Dec. 266 (BIA 1973) (examining translated transcript of

findings of the Greek Court in determining facts and circumstances of convictions for purposes of moral turpitude and petty offense determinations).

In this case, the government introduced only a small part of the conviction record. The record is incomplete. If the government now contends that the record is inadequate to show that this case did involve a minor check bouncing incident — something that was uncontested below — then the petitioner should at least be allowed to supplement the record and prove that this is indeed what occurred.

The government has the burden of proving deportability by clear, convincing and unequivocal evidence, *Woodby v. INS*, 385 U.S. 276 (1966). At a minimum, petitioner should be afforded the opportunity of supplementing the conviction record with copies of his indictment in Canada, a transcript of the sentencing hearing, etc. to show that he was indeed convicted of a petty offense. Thus, the government's newly articulated position in its brief in opposition to *certiorari* warrants a granting of the writ and a remanding of this case to the administrative authorities for further proceedings.

b. In any event, the premise of the government's argument is incorrect. It is not and has never been the law that administrative review of a foreign conviction is "limited to the judicial record of conviction," as the government argues (Resp. Br. in Opp. at p. 8). The administrative authorities have never limited themselves to the foreign record of conviction in judging whether an alien's crime is one of moral turpitude or a petty offense.

The attorney general clearly outlined this in *Matter of T-*, 2 I & N Dec. 22, 42 (A.G. 1944). There, the attorney general considered the case of a Canadian citizen who had been convicted of theft in Canada. The Canadian theft statute in-

cluded offenses which would not be so characterized under U.S. law. That is, the Canadian theft statute included the taking of property with intent to steal, (a crime involving moral turpitude) as well as a simple unlawful taking (which would not be a crime involving moral turpitude). The attorney general stated that the Board of Immigration Appeals had the obligation to examine all of the circumstances in determining exactly what the alien was convicted of:

> In any event I believe that the majority of the Board erred in concluding that the Board was precluded from exercising its independent judgment as to whether the crime for which the appellant was convicted involved moral turpitude and that it was required to decide this issue by a mechanical application of the definitions found in the Canadian statutes. I think the correct rule is that the Board is entitled to look beyond the statutes, to consider such facts as may appear from the record of conviction *or the admissions of the alien* and to reach an independent conclusion as to whether the offense is one which under our law involves moral turpitude. *Id.* at 42 (emphasis added)

The Board applied this decision in *Matter of P-*, 2 I & N Dec. 857 (BIA 1947). There, a Canadian citizen was convicted of theft in Canada. The Board found that the alien was not excludable for having committed a crime involving moral turpitude because the alien's *testimony* showed that he had only temporarily taken the property in question and did not intend to permanently deprive the victim of it. *See also Matter of Bader*, 17 I & N Dec. 525, 526-27 (BIA 1980) (upholding deportability on the basis of the alien's admissions and an uncertified copy of a foreign conviction.)

A recent example of the Board's using its discretion to examine relevant facts and circumstances is *Matter of De La Nues*, 18 I & N Dec. _____ (BIA I.D. #2885 1981), one of

the Cuban boatlift cases. There, the Board found the alien excludable based on the alien's admissions regarding his Cuban convictions. The Board did not even bother to examine Cuban law. It took the alien's admissions and compared the offenses he described with those defined in the District of Columbia Code.

The case at bar is similar to *Matter of T-, supra.* The Canadian false pretenses statute in issue here encompasses conduct which may be deemed to be a felony or a misdemeanor depending upon how one applies the "time of conviction" versus "time of entry" doctrine addressed by the Court of Appeals. Given these circumstances, the Court of Appeals did nothing unusual in going behind the bare record of conviction and accepting petitioner's claim that he was guilty only of bouncing a check.[2] This is particularly true because, as noted above, the government introduced only a small, incomplete part of the record and because the

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[2] The cases relied upon by the government are not to the contrary. In *Zinnanti v. Immigration and Naturalization Service,* 651 F.2d 420 (5th Cir. 1981), the Court considered the case of an alien who pleaded guilty to possession of an unregistered sawed-off shotgun. Such a conviction makes one specifically deportable under 8 U.S.C. Section 1251(a)(14). The Fifth Circuit merely held that this the alien could not collaterally attack his guilty plea in deportation proceedings. In that case, the alien attempted to argue to the court that his guilty plea was not voluntary. Similarly, in *Chiaramonte v. INS,* 626 F.2d 1093 (2d Cir. 1980), the Court of Appeals discussed convictions for theft in Italy. In that case, the official records showed that the alien that committed the crime of theft. The Court of Appeals did not permit the alien to explain away his moral culpability. The Court noted that the elements of the crime charged under the Italian Penal Code and larceny as understood in American law were the same. 626 F.2d at 1099. In each of these cases, the aliens tried to challenge the record of their offenses. In the case at bar, petitioner's explanation that he had been found guilty of bouncing a check was not contrary to the record, it was entirely consistent with the record.

government never contested petitioner's description of his Canadian offense.

2. The government briefly defends the Court of Appeals' opinion on the merits. The government claims that the Court of Appeals "reasonably applied a relation back theory" in upholding petitioner's deportability on novel grounds. The government also claims that no alien has the "right" to have his excludability assessed at the time of his conviction as opposed to at the time of his entry into the United States.

The government has missed the point. The Court of Appeals openly stated that its construction of the Immigration and Nationality Act was "harsh" and "anomalous". The Court of Appeals thought that its decision was compelled by the statute it was construing, 8 U.S.C. Section 1251(a)(1). The Court of Appeals was wrong. Congressional intent was to not allow grounds of excludability to relate back. *See* pet. at 9-10; *Costello v. INS*, 376 U.S. 120 (1963).

More important, the government fails to address the real issue in the petition for a writ of certioriari. That is, that the time of entry "relation back" theory applied by the Court of Appeals should never have been addressed. The Court of Appeals should have remanded the case to the administrative authorities so that they could exercise their discretion in reasonably construing the statute. This is particularly true because there are alternative constructions of the Act which do not produce the harsh and anomalous results which stem from the Court of Appeals' opinion. For example, the Board of Immigration Appeals could easily rule that an alien in petitioner's position should be given the benefit of U.S. law existing at *either* the time he was convicted or at the time that the alien entered the United States. Such a construction is plainly within the

Board of Immigration Appeals' power and would be consistent with the well-established rule that Immigration statutes must be strictly construed in favor of the alien.

3. The government's final argument is that the petitioner has not demonstrated that the issues presented are likely to arise with any frequency.

The principal issue presented in the petition for a writ of certiorari is a recurring one. It is an issue which the government commonly complains about — that is, a Court of Appeals not paying deference to the Board of Immigration Appeals. In this case, the Court of Appeals violated the well-established rule that the decision of an administrative body should be affirmed only on the grounds advanced by the administrative body.

Moreover, the novel "time of entry" versus "time of conviction" issue that the Court of Appeals reached out to decide does have significant precedential effect. The Court of Appeals' decision affects virtually all cases concerning an alien convicted of a foreign offense: cases involving determinations of deportability for crimes involving moral turpitude; cases involving the petty offense exception; cases involving the juvenile offense exception to deportability. *See Matter of De La Nues, supra.*

There are untold millions of aliens, legal and illegal, in the United States. In 1979, a total of 5, 058,400 aliens reported under the alien address program. (1979 Statistical Yearbook of the Immigration and Naturalization Service, table 34, page 81.) 966,137 aliens were required to depart the United States in 1979. *Id.* at p. 67. An additional 25,888 aliens were formally deported from the United States in 1979. *Id.* There were 55,886 deportation hearings held in 1979. *Id.* at p. 62. Yet, judicial review of orders of deportation is rare. A total of 259 cases were disposed of in 1979. *Id.* at p. 109.

These statistics reveal the flaw in the government's argument. Very few immigration cases are appealed. There are few reported decisions. Judicial precedent is of extreme significance. Further, *any* alien convicted of a bad check charge abroad is directly affected by this case. Under the Court of Appeals' decision, that alien's deportability depends on the accident of when the alien entered the United States. Bad check charges are neither infrequent nor uncommon.[3]

[3] A good analogy establishing the powerful effect of the decision below, if left undisturbed, is the issue whether possession of a concealed weapon is a crime involving moral turpitude. It has been held that such a crime is not one involving moral turpitude. Yet, the latest precedent on this issue is over 57 years old. *U.S. Ex. Rel. Andreacchi v. Curran*, 38 F.2d 498 (S.D. N.Y. 1926). This 57 year old district court opinion has set the precedent on this issue and has been followed in countless cases that have not been judicially or administratively reported. *See Matter of Granados*, 16 I & N Dec. 726, 728 (BIA 1979) (dictum citing *Andreacchi* for the proposition that conviction for possession of a concealed sawed off shotgun is not a crime involving moral turpitude).

CONCLUSION

For the reasons outlined above, as well as those outlined in the petition for a writ of *certiorari*, petitioner respectfully requests that the writ be granted and that the case be remanded to the Board of Immigration Appeals for supplementation of the record and a decision on the merits. A remand is especially in order in light of the government's present position that the record did not justify the Court of Appeals' treating this as a bad check case. This case is thus appropriate for summary disposition by this Court.

Respectfully submitted,

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